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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

JOHN F. NIESZNER,

Petitioner,

v.

DR. VERN ORR, SECRETARY OF THE AIR FORCE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

LARKIN, HOFFMAN, DALY & LINDGREN, Ltd.

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QUESTION PRESENTED FOR REVIEW

Whether a serviceman's challenge to the application of a military regulation which excludes him from an officers' program solely on the basis of age presents a justiciable issue for review by the Federal Courts under unreconciled decisions in the Second, Third, Fifth, Eighth, Ninth, and Tenth Circuits based upon the equal protection and due process clauses of the Fifth Amendment to the United States Constitution?

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Petitioner, John F. Nieszner, prays that a Writ of Certiorari issue to review a decision of the United States Court of Appeals for the Eighth Circuit, affirming

a decision of the United States District Court for the District of Minnesota. The decision of the Court of Appeals holds that the District Court improperly determined that Petitioner's challenge of Air Force Regulation 36-15, as discriminating on the basis of age, presented a nonjusticiable claim.

OPINIONS BELOW

The opinion of the Court of Appeals, reported at 684 F.2d 562, is set out in Appendix E to this Petition.[1] The Memorandum Order of the District Court is unreported and set out in Appendix D. The findings by the Air Force in response to Petitioner's Complaint are set out in the letter of Colonel Jerry D. Oberhelman, Appendix C. The initial finding of

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[1] The opinion below is entitled Nieszner v. Mark. Dr. Vern Orr has since become the Secretary of the Air Force and, therefore, the respondent in this case.

ineligibility is set out in the letter of Lt. Lloyd H. Miller and its artifact in Appendices A and B.

JURISDICTION

The opinion of the Court of Appeals was rendered on July 21, 1982. There was no request for a rehearing before the Court of Appeals. On request of Petitioner, an extension of time to file the within Petition was granted until November 18, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The constitutional provision involved are the equal protection and due process clauses of the Fifth Amendment to the United States Constitution set out in Appendix G to this Petition, as applied to the power of the United States Federal Courts to review military employment

issues. Air Force Regulation 36-15, Paragraph 2-14 is set out in Appendix F.

STATEMENT OF THE CASE

Petitioner, John F. Nieszner, a Technical Sergeant in the United States Air Force Reserve, applied for a position in the Outstanding Air Force Commissioning Program (hereinafter "the Program"), in 1974. Of seventeen (17) applicants, he was in the top four (4). He was informed there were not enough positions open at that time but that he should reeapply at a later date when positions were available. Thereafter, Petitioner was informed that no positions were open in the Program. Nieszner was refused permission to apply for the Program in 1978, the next time there was an opening, because he was by that time over the age of thirty-five (35). He was, however, advised that his qualifications were "excellent" (Appendix A). Air Force Regulation (hereinafter

"AFR") 36-15, however, provided that an applicant for the Program must be under thirty-five (35) years of age before receiving his first commission. The sole reason given by the Air Force for refusing Petitioner's request to apply to the Program was that he was thirty-six (36) years old at the time of his request.

Petitioner presented outstanding credentials, fulfilling all other qualifications required by AFR 36-15. The first requirement was a four-year college degree. Petitioner possessed both a Bachelor's Degree and a Master's Degree. Second, the regulation required an acceptable score on the Air Force Officer's Qualification Test. Petitioner passed the test. The third requirement was completion of the Air Force Officer Preparatory Course. Petitioner successfully completed the course. In addition, he was a Non-Commissioned Officer Academy Honor

Graduate ranking number one in his one hundred eight (108) person class, and had a record of perfect attendance in his fourteen (14) years of service in the Air Force Reserve. In short, his qualifications were "excellent" (Appendix A).

Petitioner has exhausted all administrative remedies available to him. Initially, he pursued an age discrimination grievance through Air Force channels. Petitioner was informed that the Air Force did not consider age qualifications discriminatory. Petitioner pursued further redress through the office of the United States Air Force Reserve Inspector General. Col. Oberhelman informed him that the Inspector General Complaint System, AFR 123-11, did not provide for the processing of complaints concerning Air Force Regulations. (Appendix C).

On September 22, 1980, Petitioner instituted suit in the United States

District Court for the District of Minnesota against the Air Force alleging a violation of his Constitutional rights. Respondent moved for dismissal or summary judgment and a hearing was held September 4, 1981. The Honorable Donald D. Alsop dismissed Petitioner's Complaint without reaching the merits of his contentions or the legal arguments raised on the ground that the decision of the military officials did not present a justiciable question. (Appendix D). Petitioner appealed to the United States Court of Appeals for the Eighth Circuit. The Court of Appeals affirmed the dismissal by the District Court holding that Petitioner presented a nonjusticiable issue. (Appendix E).

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari in this case because the decision of the Eighth Circuit Court of Appeals, based

primarily upon the analysis of a decision of the Fifth Circuit conflicts with the Third Circuit Court of Appeals on the issue of the justiciability of the challenge to military regulations. This Court simply has not provided clear guidance on how to proceed in determining the extent to which the judiciary should inquire into military matters. The split which has developed in the circuits with respect to this issue must be resolved by this Court. Accordingly, this Court should grant certiorari.

I.

THE FEDERAL COURTS OF APPEALS HAVE RENDERED CONFLICTING AND UNRECONCILED DECISIONS WHICH REQUIRE RESOLUTION ON THE JUSTICIABILITY OF CHALLENGES TO MILITARY REGULATIONS.

To date, the various circuit courts have adopted primarily two divergent sets of standards for determining whether to permit judicial review of military regulations.[2] In this case, the Eighth Circuit followed the analysis formulated over a decade ago by the Fifth Circuit in Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971). The Third Circuit, however, has recently rejected that approach and adopted a contradictory approach with respect to the issue of justiciability in Dillard v. Brown, 652 F.2d 316 (3d Cir. 1981). Other circuits have surveyed the

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2 Reviewability and justiciability are used interchangeably. Dillard v. Brown, 652 F.2d 316, 322 n.4 (1981).

applicable conflicting case law and reached the conclusion that, "[t]here is no guidance from the Supreme Court on how to proceed in determining how far the judiciary should inquire into military matters." Lindenau v. Alexander, 663 F.2d 68, 72 (10th Cir. 1981). See, Wallace v. Chappell, 661 F.2d 729, 732 (9th Cir. 1981). This Court, therefore, should grant certiorari to provide the needed guidance and uniformity.

A. The Approach Formulated by the Fifth Circuit in Mindes v. Seaman Improperly Permits a Court to Avoid a Determination on the Merits of the Claim by Invoking the Concept of Justiciability.

In Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971), Air Force Captain Mindes claimed that he had received an erroneous and adverse Officer Effectiveness Report which resulted in his assignment to reserve status. He sought to have the report voided through intraservice

procedures, but to no avail. Subsequently, he filed a Complaint in District Court which the Court dismissed for lack of subject matter jurisdiction. The Fifth Circuit reversed, holding that there was subject matter jurisdiction and noting that not all military affairs are automatically nonreviewable. The Fifth Circuit remanded, instructing the trial court to apply the following test:

> [A] court should not review internal military affairs in the absence of (a) an allegation of the deprivation of a constitutional right, or an allegation that the military has acted in violation of applicable statutes or its own regulations, and (b) exhaustion of available intraservice corrective measures.

The Court further noted that the following four additional factors should be examined in deciding whether to review the military decision, namely:

> 1. The nature and strength of the plaintiff's challenge to the military determination. Constitutional claims, normally more important than those having only

a statutory or regulatory base, are themselves unequal in the whole scale of values -- compare haircut regulation questions to those arising in court-martial situations which raise issues of personal liberty. An obviously tenuous claim of any sort must be weighted in favor of declining review.

2. The potential injury to the plaintiff if review is refused.

3. The type and degree of anticipated interference with military function. Interference per se is insufficient since there will always be some interference when review is granted, but if the interference would be such as to seriously impede the military in the performance of vital duties, it militates strongly against relief.

4. The extent to which the exercise of military expertise or discretion is involved. Courts should defer to the superior knowledge and experience of professionals in matters such as promotions or orders directly related to specific military functions.

Id. at 201-02 (citation omitted).

Some form of the Mindes test has been used in several circuits. Lindenau v. Alexander, 663 F.2d 68 (10th Cir. 1981)

(National Guard Regulation precluded single parents with minor dependents from enlisting);[3] Wallace v. Chappell, 661 F.2d 729 (9th Cir. 1981) (Navy enlisted men brought action against superior officers for race discrimination in, e.g. duty assignments and selection for training programs). The Fifth Circuit itself recently expanded application of the

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[3] Even within the Tenth Circuit, however, the Judges disagreed on which test to adopt for reaching decisions in these cases. Judge McKay noted:

> This Fifth Circuit position [Mindes] was developed prior to the decision of the United States Supreme Court in Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, . . . (1979), and, in my view, is no longer tenable. I believe the correct analysis is that posited by the Third Circuit in Dillard v. Brown, 652 F.2d 316 (3rd Cir. 1981), subsequent to Feeney.

Lindenau v. Alexander, 663 F.2d 68, 74-5 (10th Cir. 1981) (concurring opinion) (emphasis added).

Mindes test by using it to decide the reviewability of equal protection claims as well as due process claims. Woodard v. Marsh, 658 F.2d 989 (5th Cir. 1981). Petitioner's claim here involves both types of claims.

B. The Approach Formulated by the Third Circuit in Dillard v. Brown Does Not Preclude a Decision on the Merits by Barring Consideration of the Case as Nonjusticiable.

The Third Circuit explicitly rejected the Mindes approach in Dillard v. Brown, 652 F.2d 316 (3rd Cir. 1981). As in Lindenau, Dillard involved a challenge to a National Guard Regulation forbidding enlistment of single parents of minor children. After reviewing the Mindes test, the Third Circuit declined to adopt the test stating as follows:

> [I]f the military justification outweighs the infringement of the plaintiff's individual freedom, we may hold for the military on the merits, but we will not find claim to be nonjusticiable and therefore not cognizable by a court.

652 F.2d at 323-34 (emphasis added). By finding Dillard's claims justiciable, this holding is in direct conflict with Lindenau and West v. Brown, 558 F.2d 757 (5th Cir. 1977), cert. denied, 435 U.S. 926 (1978), on the facts and with Mindes on the test to be applied. In thus rejecting the Fifth Circuit's approach, the Third Circuit observed:

> We prefer an analysis which does not mingle concepts of justiciability with those affecting the merits of the claim to the extent that Mindes requires. . . . [t]he difficulty which we perceive with the Mindes analysis is that it intertwines the concept of justiciability with the standards to be applied to the merits of the case. As we have pointed out, the Supreme Court in both Gilligan [v. Morgan, 413 U.S. 1 (1973),] and Orloff [v. Willoughby, 345 U.S. 83 (1953),] has established the basic parameters for determining the justiciability of challenges brought against the military. Once a claim falls within these parameters, a court should review the claim on the merits. Even if such constitutional challenge appears weak or frivolous, jurisprudentially that claim should be rejected on the merits, rather than deemed to be nonjusticiable by a federal court.

Dillard v. Brown, 652 F.2d at 323 (emphasis added).

In Gilligan, as a result of the Kent State shootings, the plaintiffs sought "continuing regulatory jurisdiction" over the activities of the Ohio National Guard. 413 U.S. at 5. A plaintiff seeking constitutional review of a military regulation by a federal court engages the court neither in continuing regulation nor in a task for which it has no competence. To the contrary, holding a constitutional challenge unreviewable leaves a plaintiff in the position of asking the military to judge the constitutionality of its own regulations; a task for which the military has no competence.

In Orloff v. Willoughby, 345 U.S. 83, 94 (1953), this Court observed that the military and judicial establishments should maintain a mutual respect for their

respective areas of competence, stating as follows:

> The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.

Id. at 94 (emphasis added).

The merits of a constitutional challenge fall particularly within the court's area of competence. Further, a court should consider the justifications for a regulation, offered by military authorities, independently from the regulation's reviewability. A court using the Mindes approach masks a judgment on the merits with a procedural finding of nonreviewability.

The Circuits following Mindes have made much of Orloff's "hands off" language, but have failed to consider the fact that Orloff allowed review of a

constitutional claim. In Orloff, the Army refused to commission a drafted doctor as an officer because he would not divulge whether he was associated with subversive organizations. Simply, Orloff holds that duty assignments will not be reviewed by a court unless there is a statutory or constitutional violation. Therefore, a constitutional challenge to a military regulation where a court is not required to exercise continuing regulatory jurisdiction, is justiciable.

The Second Circuit has taken a position similar to the position taken by the Third Circuit in Dillard. In Crawford v. Cushman, 531 F.2d 1113 (2d Cir. 1976), a Marine challenged a regulation mandating discharge for pregnancy. The court found the regulation invalid on both equal protection and due process grounds. In its discussion of reviewability, the court observed:

> As the Supreme Court demonstrated in Schlesinger v. Ballard, supra, and Frontiero v. Richardson, 411 U.S. 677 . . . (1973), military treatment of personnel in allowing benefits for "dependants" and in discharging officers for failure to achieve promotion is subject to judicial review and to constitutional requirements even though such treatment may equally be a "valid military concern."
>
> In the light of Levy, Ballard, and Frontiero, we find there to be no basis for a judicial deference to the military here which precludes the review of appellant's substantive constitutional claims.

531 F.2d at 1121 (emphais added).

The court in Crawford reached this conclusion based on the same substantive constitutional challenge involved in Lindenau v. Alexander, 663 F.2d 68 (10th Cir. 1981), and West v. Brown, 558 F.2d 757 (5th Cir. 1977) (freedom of personal choice in matters of marriage and family life). The Second Circuit was aware of Mindes but did not adopt its test. Crawford v. Cushman, 531 F.2d 1114, 1120, 1121 n.6 (2d Cir. 1976). Though the facts of the cases were similar to Crawford, the

Fifth Circuit in West v. Brown and the Tenth Circuit in Lindenau, reached an opposite result from the Second Circuit because they applied the Mindes test. The Second Circuit found justiciability; the Fifth and Tenth Circuits found nonjusticiability.

The Second Circuit discussed Orloff and noted the need for Supreme Court guidance in this area, stating:

> To be sure, there is precious little Supreme Court law to tell us which rights clearly held by civilians apply in what circumstances to members of the military community.

531 F.2d at 1120-21.

Petitioner suggests that the instant matter is a most appropriate vehicle to establish and illuminate this Court's position on the issue.

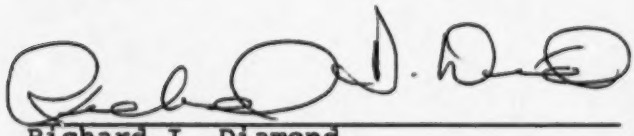
CONCLUSION

Petitioner respectfully requests that the United States Supreme Court grant the within Petition for Writ of Certiorari to

review the decisions of the United States Court of Appeals for the Eighth Circuit. This Court should provide the needed guidance by addressing the growing split in the circuits' approaches to the issue of the reviewability or justiciability of military regulations, exemplified by the Fifth Circuit in Mindes and the Third Circuit in Dillard.

Respectfully submitted,

LARKIN, HOFFMAN, DALY & LINDGREN, Ltd.



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